

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)

RAINBOW BROADCASTING COMPANY)

For an Extension of Time to Construct)

and)

For an Assignment of its Construction Permit)
for Station WRBW(TV), Orlando, Florida)

GC Docket No. 95-172

File No. BMPCT-910625KP

File No. BMPCT-910125KE

File No. BTCCT-911129KT

To: Administrative Law Judge
Joseph Chachkin

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SEPARATE TRIAL STAFF'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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SUMMARY

This is a proceeding on remand from the United States Court of Appeals for the District of Columbia Circuit to determine whether the applications of Rainbow Broadcasting Company ("RBC") for an extension of time to construct and for an assignment of its construction permit for Station WRBW(TV), Orlando, Florida, should be granted.

Based upon the evidence adduced at the hearing, the Separate Trial Staff ("Staff") concludes that the extension applications should be denied and the construction permit cancelled. At a minimum, RBC was lacking in candor with respect to its financial qualifications, in violation of Sections 1.17 and 73.1015 of the Commission's rules. RBC's representations to the Commission in its fifth extension application -- that it continued to be financially qualified and that it was "ready, willing and able" to construct and operate its proposed station -- were inaccurate, misleading and, at a minimum, lacking in candor. At precisely the same time RBC was making these representations to the Commission, it was seeking an injunction in the United States District Court for the Southern District of Florida to prevent Press Broadcasting Company ("Press") from operating from the same transmission tower Rainbow proposed to use. In that litigation, which had been initiated by RBC, RBC was claiming, *inter alia*, that, if the tower owner allowed Press to broadcast from the top slot and its aperture on the tower, "[RBC's] ability to compete in the Orlando television market will be obstructed to the point that *it will not be able to secure the financing to build a television station*" on the tower "or any other tower in the area." (Emphasis added.) The District Court, moreover, found in June 1991 that "[RBC] . . . has not obtained *any financing commitment* for the project." (Emphasis added.) RBC did not report the representations it had made to the District Court -- or the Court's adverse findings -- to the Commission.

The Staff also concludes that, at a minimum, RBC was lacking in candor regarding its failure to construct, in violation of Sections 1.17 and 73.1015 of the Commission's rules. RBC's assertion in its extension applications -- that it required extensions because "[a]ctual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida" -- was grossly inaccurate, misleading and, at a minimum, lacking in candor because RBC had initiated the tower litigation and was in no way precluded from beginning construction by its pendency. RBC's lack of candor regarding its financial qualifications and its failure to construct were deliberate and repeated. Based on RBC's demonstrated pattern of misconduct, the Staff is unable to conclude that RBC can be trusted to deal truthfully with the Commission.

Separate and apart from the foregoing adverse conclusions under the misrepresentation/lack of candor issues, the Staff also concludes that RBC has not demonstrated that a grant of an extension under Section 73.3534(b) is justified by the evidence. A party seeking an extension of a construction permit pursuant to this rule must demonstrate either that construction has been completed, or that substantial progress has been made toward completion, or that no progress has been made as a result of circumstances beyond a permittee's control. In this case, RBC made no such showing, and the evidence is overwhelming that its failure to construct was a purely voluntary decision based on RBC's judgment that the competitive environment in the Orlando television market did not justify construction between late August 1990 and late June 1991. Such a private motivation has been repeatedly held by the Commission and the courts not to justify a permit extension.

The Staff also concludes that RBC has not demonstrated that a grant of a waiver of

Section 73.3598(a) is justified. RBC did not present any specific evidence to justify a waiver of Section 73.3598(a); therefore, there was a failure of proof by RBC under the waiver issue. Moreover, a waiver is not justified on the basis of other evidence in the record.

The staff concludes, however, that the *ex parte* issue should be resolved in RBC's favor. There is insufficient evidence to conclude that RBC intended to violate Sections 1.1208 and 1.1210 of the Commission's *ex parte* rules. The evidence establishes that RBC's counsel, Margot Polivy, sincerely believed the proceeding to be unrestricted as to RBC alone when she solicited Antoinette Cook Bush, Senior Counsel to the United States Senate Subcommittee on Communications, in late June 1993 to call the Commission on RBC's behalf, and when she and a principal of RBC met with members of the Mass Media Bureau on July 1, 1993 to discuss the merits of RBC's applications. On the basis of this record, the Staff concludes that it would be inappropriate to deny RBC's applications on the basis of the isolated *ex parte* contacts initiated by its counsel.

Finally, the Staff concludes that, in light of the evidence adduced pursuant to the designated issues, RBC is not qualified to be a Commission licensee and a grant of the subject applications would not serve the public interest, convenience and necessity. Therefore, the Staff recommends that the Presiding Judge deny RBC's applications for extension of time to construct and dismiss as moot its application for a *pro forma* assignment of its construction permit to Rainbow Broadcasting, Ltd. The Staff also recommends that RBC's construction permit be cancelled and its call sign deleted.

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**SEPARATE TRIAL STAFF'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Preliminary Statement

1. By Memorandum Opinion and Order, *Rainbow Broadcasting Company*, 9 FCC Rcd 2839, released May 23, 1994 (Jt. Ex. 10), the Commission affirmed the decision of the Chief of the Mass Media Bureau that reinstated the construction permit and the call sign of Rainbow Broadcasting Company ("RBC"), granted RBC's application for an extension of time within which to construct television station WRBW(TV), Channel 65, Orlando, Florida, and granted RBC's application for a *pro forma* assignment of its construction permit to Rainbow Broadcasting, Ltd. ("RBL"). Although the Commission found that RBC and its counsel had violated the Commission's rules prohibiting *ex parte* presentations in restricted proceedings, 47 C.F.R. § 1.1200 *et. seq.* (hereinafter "the *ex parte* rules"), the Commission found that RBC and its counsel appeared to have sincerely believed that the proceeding was not restricted under the *ex parte* rules, and imposed no sanction against RBC for the *ex parte* violations. By the same Order, the Commission denied a contingent application for review and an emergency petition for extraordinary relief filed by Press Broadcasting, Inc. ("Press"), the licensee of television station WKCF(TV), Channel 18, Clermont, Florida, which had opposed RBC's extension and assignment applications.

2. Press appealed to the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals"). On July 21, 1995, the Court of Appeals reversed the Commission's order. *Press Broadcasting Co., Inc. v. FCC*, 59 F.3d 1365 (D.C. Cir. 1995) ("*Press*"). Specifically, the Court of Appeals held that:

- RBC could not reasonably have believed the proceeding to be unrestricted

under the *ex parte* rules because the Commission's staff had repeatedly informed RBC's counsel that it considered the proceeding to be restricted, and therefore the Commission's determination that RBC and its counsel sincerely believed that the proceeding was not restricted was contrary to the facts of the case;

- RBC's improper *ex parte* contacts with Commission employees to discuss the merits of RBC's applications did not make the Commission's subsequent decision-making process irrevocably tainted so as to make the Commission's ultimate judgment in RBC's favor impermissibly unfair;

- substantial and material questions of fact existed regarding RBC's representations to the Commission in RBC's extension applications about its financial qualifications and the reasons for its failure to construct during prior extension periods; and

- on the merits, the Commission could not grant RBC's extension applications on the ground that RBC was not afforded the "normal" 24-month construction period provided by Section 73.3598(a) of the Commission's rules and thus did not need to make the showings ordinarily required of applicants by Section 73.3534(b).

The Court, therefore, remanded the matter to the Commission and ordered it to "conduct further proceedings consistent with this opinion" to resolve these questions. 59 F.3d at 1373.

3. By *Memorandum Opinion and Order and Hearing Designation Order* ("*HDO*"), 11 FCC Rcd 1167, released November 22, 1995,¹ the Commission responded to

¹ The *HDO* is published in the Federal Register, 61 Fed. Reg. 3423, January 31, 1996.

the Court's decision in *Press* and designated the above-captioned applications for hearing on the following issues:

- (1) To determine whether [RBC] intentionally violated Sections 1.1208 and 1.1210 of the Commission's *ex parte* rules by soliciting a third party to call the Commission on [RBC's] behalf, and by meeting with Commission staff to discuss the merits of [RBC's] application proceedings.
- (2) To determine whether [RBC] made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station, in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise.
- (3) To determine whether [RBC] made misrepresentations of fact or was lacking in candor regarding the nature of the tower litigation in terms of its failure to construct in connection with its fifth and sixth extension applications, in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise.
- (4) To determine whether [RBC] has demonstrated that under the circumstances either grant of a waiver of Section 73.3598(a) or grant of an extension under Section 73.3534(b) is justified.
- (5) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether [RBC] is qualified to be a Commission licensee and whether grant of the subject applications serves the public interest, convenience and necessity.

11 FCC Rcd at 1168-69 ¶ 9; *Erratum*, released December 15, 1995.

4. The *HDO* made *Press* a party to the hearing and directed the Office of General Counsel to designate a separate trial staff to represent the Commission, in light of the Bureau's recusal from the proceeding. *Id.* at ¶ 10. The *HDO* placed the burden of proceeding with the introduction of evidence upon issues (1) through (5) and the burden of proof with respect to all issues upon RBC. *Id.* at ¶ 11.

5. Hearing sessions were held in Washington, D.C. on June 25, 26, 27 and 28, 1996, and July 11, 1996. The record was closed on July 11, 1996. *Order*, FCC 96M-177, released July 16, 1996; Tr. 1065.

PROPOSED FINDINGS OF FACT

Issue 1: *Ex Parte* Issue

6. Issue 1 seeks "To determine whether [RBC] intentionally violated Sections 1.1208 and 1.1210 of the Commission's *ex parte* rules by soliciting a third party to call the Commission on [RBC's] behalf, and by meeting with Commission staff to discuss the merits of [RBC's] application proceedings."

7. The issue arose because of two *ex parte* contacts between representatives of RBC and the Mass Media Bureau staff following the June 18, 1993 decision of Barbara Kreisman, Chief of the Video Services Division ("VSD") of the Mass Media Bureau denying RBC's sixth extension application, and dismissing as moot RBC's pending application to assign the construction permit to RBL. Jt. Ex. 8 (hereinafter the "VSD decision"). In response to the VSD decision, representatives of RBC made two *ex parte* contacts with various members of the staff of the Mass Media Bureau, during which the defects in the VSD decision and the merits of RBC's position were discussed:

- a telephone call by Ms. Antoinette Cook Bush (" Ms. Bush"), then senior counsel to the Senate Committee on Commerce and Transportation (Tr. 553) to Roy Stewart, Chief of the Mass Media Bureau by telephone in late June, 1993 (Tr. 571-73); and
- a meeting on July 1, 1993 between Margot Polivy (RBC's counsel), Joseph Rey (a general partner of RBC) and several high ranking members of the Mass Media Bureau staff, specifically Bureau Chief, Roy Stewart, and Barbara Kreisman, Chief of the Video Services Division, Clay Pendarvis, Chief of the Television Branch, Robert Radcliffe, Assistant Chief for Law of the Mass

Media Bureau, and Paul Gordon, a staff lawyer in the Television Branch . Jt. Ex. 1, Stipulation No. 26.

On July 2, 1993 (the day following the *ex parte* meeting with Mr. Stewart and his top staff), RBC filed a "Petition for Reconsideration and Reinstatement and Grant of Application for Assignment of Construction Permit." Jt. Ex. 1, Stipulation No. 29. On July 30, 1993, the Chief of the Mass Media Bureau granted the petition for reconsideration, reinstated the construction permit, and granted the transfer of control to RBC. Jt. Ex. 9, p. 3.

8. Upon Press's application for review of the July 30, 1993 Bureau order reinstating RBC's construction permit, the Commission held that RBC violated the *ex parte* rules in its two contacts with the Bureau staff in the period after the initial June 18, 1993 VSD decision. Jt. Ex. 10 at 5-8. In deciding that these contacts were prohibited by the FCC's *ex parte* rules, the Commission held that (1) the *ex parte* rules applied because Press formally had opposed Rainbow's fifth extension application by filing a petition for reconsideration in February 1991 (*id.* at 6); (2) both Ms. Bush's telephone call to the Bureau chief in late June, 1993 and the meeting with the Mass Media Bureau staff on July 1, 1993 addressed the merits of Rainbow's pending application (*id.* at 7). However, the Commission concluded that these violations of the *ex parte* rules were not sufficient to disqualify RBC, "recognizing that Rainbow's counsel apparently sincerely believed that the proceeding was not restricted and has advanced a plausible argument in support of that belief, we conclude that no sanction should be imposed." *Id.* at 5.

9. The Court of Appeals held that, on the record before it, the Commission's finding that RBC's counsel reasonably believed that the proceeding was not restricted was "contrary to the facts." *Press Broadcasting, supra*, 59 F.3d at 1370. The Court concluded

that "[t]he record establishes that [RBC] could not reasonably have believed the proceeding to be unrestricted because the FCC had repeatedly informed [RBC's] counsel that it considered the adjudication to be restricted within the meaning of its *ex parte* rules." *Id.* The Court remanded the case for further proceedings consistent with its decision.

10. Following the remand, the Commission designated RBC's applications for hearing on five issues, including whether RBC "intentionally violated" the *ex parte* rules in the two improper contacts with the Bureau staff in 1993. Thus, there is no longer any issue in this proceeding that RBC actually violated the *ex parte* rules in the two contacts with the FCC staff. That issue has already been decided by the Commission, and affirmed by the Court of Appeals. Rather, the only issue to be addressed in this proceeding is the state of mind of RBC and its counsel in taking these improper actions. As the Commission recognized in a further order, permitting the deposition of certain members of the FCC staff with relevant knowledge of the *ex parte* contacts, the *ex parte* issue in this hearing focuses on "Rainbow's understanding of the applicability of the *ex parte* rules to this proceeding." *Rainbow Broadcasting Co.*, FCC-96-213, (rel. May 13, 1996) at 3 ¶ 11 (Official notice requested).

11. Although the question whether RBC violated the *ex parte* rules is not at issue in this hearing, a review of the facts leading up to the *ex parte* contacts will assist in the determination of whether the violations were "intentional."

12. RBC has been a client of the firm of Renouf & Polivy since 1987 and that firm has been RBC's communications counsel in all matters relevant to this proceeding. Tr. 376. Margot Polivy has been a partner in Renouf & Polivy since 1972. Tr. 375. Ms.

Polivy has practiced before the Commission for more than 30 years. Tr. 506. From 1964 to 1970, Ms. Polivy worked at the FCC, first as an attorney advisor at the FCC Review Board, then as a trial attorney at the Hearing Division of what was then the FCC's Broadcast Bureau, and then at the Office of General Counsel in the Office of Administrative Law. Tr. 376. Ms. Polivy is, thus, an experienced communications lawyer.

13. RBC has stated on the record that it relied solely on counsel in determining its compliance with the *ex parte* rules, and it waived the attorney-client privilege to put Ms. Polivy on the stand in its defense on the *ex parte* issue.

14. On January 25, 1991, RBC filed an application for a fifth extension of its permit to construct its television station in Orlando, Florida (File No. BMPCT-910125KE). Jt. Ex. 2.

15. On February 5, 1991, the Commission, granted RBC's application for a fifth extension of its construction permit (File No. BMPCT-910125KE). Jt. Ex. 1, Stipulation No.

14. The Commission issued a public notice announcing the filing of the application on February 5, 1991, the same day the Commission approved the application. Tr. 400, 485.

16. After the Commission granted RBC's fifth extension application, Press filed an "Informal Objection" to RBC's fifth extension application on February 15, 1991. Jt. Ex. . 1, Stipulation No. 14. Press Ex. 13, pp. 5-33. When Press learned that the Commission had already approved RBC's fifth extension request, it filed a Petition for Reconsideration on February 25, 1991. Press. Ex. 5.

17. Ms. Polivy received a copy of Press' Informal Objection and Petition for Reconsideration. Tr. 377-78, 379. She sent copies of both documents to Joseph Rey and

discussed both filings with him. Tr. 378, 379. Mr. Rey holds 90% of the partnership shares of RBC, is the general partner of RBL, and is the general manager of station WRBW-TV. Tr. 710-11. RBC, through Ms. Polivy, filed an Opposition to Press' Petition for Reconsideration. Tr. 379.

18. RBC filed an application for a sixth extension of its construction permit (File No. BMPCT-910625KP) on June 25, 1991. Jt. Ex. 3. On July 10, 1991, Press filed an "Informal Objection" to RBC's sixth extension application. Jt. Ex. . 1, Stipulation No. 18. Ms. Polivy received a copy of Press' Informal Objection. Tr. 381. She sent a copy of the pleading to Mr. Rey, and discussed it with him. Tr. 382.

19. On September 10, 1991, George G. Daniels, of Orlando Florida, wrote to the FCC concerning RBC's application for an extension of its construction permit. In response, Douglas Sandifer, of the staff of the Office of Managing Director, sent Mr. Daniels a letter on October 8, 1991 (hereinafter referred to as "the Daniels' letter"). Jt. Ex. . 4. The letter stated in pertinent part:

Your letter to the Managing Director was forwarded to the Office staff for reply in keeping with the Commission's *ex parte* rules, which deal with communications relative to the outcome of all "restricted" proceedings under consideration by the Commission. The Managing Director asked me to respond on his behalf.

The *ex parte* rules require service on all parties of filings addressing the merits or outcome of restricted proceedings. Because there was a Petition for Reconsideration filed in February 1991, (supplemented June 1991) and an Objection filed in July 1991, of the grant of the application of Rainbow for extension of construction permit in this matter, the proceeding is considered "restricted" until such time as a final Commission decision is made and no longer subject to reconsideration or review by the Commission or the courts. See 47 CFR Section

1.1208. The Commission granted Rainbow a construction permit but the station has not been constructed. A decision in this matter is not expected for several months.

In accordance with FCC rules as found in 47 CFR Section 1.1212(e), I am, by copies of this letter, providing notice and disclosure of your communication to all parties to this proceeding. Additionally, this letter and your communication will be placed in a public file associated with (but not made a part of) the record in the proceeding. See 47 CFR Section 1.1212(d).

20. The Daniels letter showed that copies were sent to RBC's outside counsel, Margot Polivy, and Press' outside counsel, Harry F. Cole. Jt. Ex. 4 at p.2. Ms. Polivy received a copy of the Daniels letter sometime in October 1991. Tr. 382, 405. She read the letter at the time she received it. Tr. 405-06.

21. Ms. Polivy testified that at the time she received the Daniels letter, she understood it to explain to Mr. Daniels that the proceeding was restricted as to Mr. Daniels as an informal party, but it was not restricted as to RBC as the applicant. Tr. 383. She testified that she based her opinion on her understanding of a portion of the *ex parte* rules that are not cited in the Daniels letter -- the note to Section 1.1204(a). Tr. 383. Ms. Polivy believed that the note to Section 1.1204(a) permitted oral *ex parte* contacts between the formal party involved in the proceeding or its representative, but barred *ex parte* contacts, written or oral, by informal objectors such as Mr. Daniels and Press. Tr. 383-84. On the basis of that reading of the note to the *ex parte* rules, Ms. Polivy believed that the restriction stated in the Daniels letter applied to Mr. Daniels, but was not directly relevant to RBC as the formal party. Tr. 384, 405-07. Ms. Polivy did not go back and review the actual text of the *ex parte* rules. Tr. 410-11; 416-417. Ms. Polivy did not seek clarification or attempt to

discuss the Daniels letter with Mr. Sandifer, or anyone else at the FCC. Tr. 411, 416.

22. Ms. Polivy does not recall sending a copy of the Daniels letter to Mr. Rey, and does not recall discussing the letter with him. Tr. 382. She stated that she did not discuss this particular letter with Mr. Rey because in her view "it didn't apply to [RBC] and it's not the sort of letter I would sent to a client. It is of no specific interest to the client. It didn't affect [RBC]. " Tr. 382-83.

23. On November 27, 1991, RBC filed a "Supplement" to its sixth extension application (File No. BMPCT-910625KP). Jt. Ex. 5.

24. On November 29, 1991, RBC filed an application for the consent to the *pro forma* assignment of construction permit to Rainbow Broadcasting, Ltd. Press Ex. 18.

25. By letter dated March 22, 1993, VSD wrote RBC to inquire as to the status of the project. Jt. Ex. 6. The VSD letter stated:

By letter dated November 27, 1991, you stated that you expected to construct the station by December, 1992. However, it does not appear that construction has been completed. At this time, we cannot conclude that grant of the extension application would serve the public interest. We therefore request that you provide a detailed explanation of the actions you have taken since November, 27, 1991. Accordingly, further consideration of your application will be deferred for 20 days to allow you the opportunity to respond.

The letter showed that it a copy was sent to Harry T. Cole, Press' counsel. Thus, as early as March 22, 1993, RBC and Ms. Polivy knew that the extension application was in jeopardy.

26. RBC responded to the VSD's inquiry by letter dated April 12, 1993. Jt. Ex.

7. In that letter, RBC stated that it had taken no actions towards construction of the station

since its November 27, 1991 letter, claiming that RBC has selected equipment for station construction but that "[release of those funds is tied to F.C.C. approval of the transfer of the permit to [RBL]." Jt. Ex. 7, p. 4.

27. Ms. Policy had several conversations regarding the pending RBC applications with Paul Gordon, a staff attorney within the Television Branch of the VSD. Tr. 418-19, 512. Mr. Gordon was the staff attorney assigned to handle the pending RBC applications. Tr. 1016-17. Renouf & Polivy billing ledgers show that Ms. Polivy recorded time for at least four telephone conversations with Mr. Gordon between March 26, 1993 and July 1, 1993. Press. Ex. 2; Tr. 419-24 .

28. Mr. Gordon testified that on at least three occasions, when Ms. Polivy began to argue the merits of the applications, he cut her off saying that the RBC proceeding was restricted and that he could not have a *ex parte* discussion on the merits with her. Tr. 1018-21. Mr. Gordon further stated that each time he told Ms. Polivy that the matter was restricted, she argued that it was not restricted. Tr. 1018-21. Each time, Mr. Gordon then cut Ms. Polivy off. *Id.*

29. Ms. Polivy asserts that she never made any attempt to discuss the merits of the application with Mr. Gordon, and that he never stated to her that the proceeding was restricted. Tr. 504-13. Ms. Polivy also denied that she had any discussions about the applicability of the *ex parte* rules with Mr. Gordon. *Id.* She claimed that her calls with Mr. Gordon were "aggressive status calls" which she defined as "[trying] to impress upon him that all the pleadings were in [and] [t]here was no reason why we couldn't get a decision out on this thing." Tr. 509. Ms. Polivy suggested that Mr. Gordon's testimony varies from hers

because he is motivated by "animus" and has engaged in "fantastical post-hoc recollections" (Tr. 429-31).

30. On June 18, 1993, the VSD denied RBC's application for a sixth extension of its construction permit was filed on June 25, 1991, cancelled the construction permit, and found the application for assignment was, therefore, moot. Jt. Ex. 8. The VSD concluded that RBC's failure to complete timely construction of its station was not due to circumstances beyond its control, and that Rainbow had therefore failed to meet the requirements for obtaining an extension of time. Jt. Ex. 8, p. 3. The VSD decision was addressed to both Ms. Polivy and Mr. Cole. *Id.* at p. 1.

31. Ms. Polivy was told of the substance of the VSD decision by Mr. Gordon on June 24, and received a written copy by mail on June 28, 1993. Tr. 384-85. Ms. Polivy was "shocked" by the VSD decision. Tr. 506. She called it "an appalling decision." Tr. 392.

32. In late June 1993, after learning of the VSD decision, Ms. Polivy telephoned Ms. Bush and asked her to contact the FCC in connection with the RBC applications. Jt. Ex. 1, Stipulation No. 25. Ms. Polivy did not mention to Ms. Bush that there was any question regarding the restricted status of the RBC proceedings. Tr. 579. Nor did Ms. Polivy discuss with Ms. Bush the Daniels letter. Tr. 584-85. And she did not tell Ms. Bush about Press' filing of a still pending Petition for Reconsideration. Tr. 589.

33. According to Mr. Polivy, she asked Ms. Bush to "find out what was going on over there" because the Commission had "certainly done something that was different from anything they had ever done." Tr. 523-24. Ms. Polivy also testified that the purpose of Ms.

Bush's call was "to get the attention of senior staff" at the Mass Media Bureau so that they would take any petition for reconsideration RBC filed "seriously." Tr. 519. Ms. Polivy understood that Ms. Bush was at that time counsel for the Senate Committee on Commerce and Transportation, and that having Ms. Bush contact the Mass Media Bureau regarding the VSD decision would put pressure on the staff. Tr. 523.² Ms. Bush recognized that Ms. Polivy was very "upset" and "irate" at the time she called her to ask Ms. Bush to contact the FCC staff. Tr. 557, 568, 569, 571, 719..

34. Ms. Bush agreed to call the FCC "to see if there was any additional information that the Commission [staff] could provide." Tr. 572. Ms. Bush testified that she considered the call to the Mass Media Bureau staff a "status call" within her prerogative as counsel for a Senate Committee with oversight responsibilities for the FCC. Tr. 571-72, 585-87. Before making the call, Ms. Bush did not attempt on her own to determine whether the proceeding was restricted under the *ex parte* rules. Tr. 588-89.

35. Ms. Bush contacted Mr. Stewart by telephone from her home in New York City, where she was on maternity leave. Tr. 568, 572. Ms. Bush and Mr. Stewart had a short conversation regarding the RBC matter. Tr. 572. Ms. Bush stated that she has no recollection of the substance of the conversation. Tr. 573. Mr. Stewart recalled During the telephone call with Ms. Bush, she asked whether the denial of RBC's application was consistent with the Commission's minority ownership policies. Tr. 583-84. Ms. Bush had

² The Court of Appeals in *Press* also noted that Ms. Bush is the stepdaughter of Vernon Jordan, who directed President Clinton's transition team. 59 F.3d at 1368 n.1. (Official notice requested.)

no specific recollection of the conversation and stated that she could therefore not deny the accuracy of Mr. Stewart's statement. Tr. 572-73, Tr. 582-84. Mr. Stewart told Ms. Bush that he would look into the matter and get back to her. Tr. 573. Ms. Bush further testified that Clay Pendarvis, Chief of the Television Branch of the Video Services Division, called her back on behalf of Mr. Stewart. Tr. 574-75. Mr. Pendarvis told Ms. Bush that if there were additional information that RBC wished the staff to consider regarding RBC's applications, it should file a petition for reconsideration. Tr. 575. In separate calls to Ms. Polivy, Ms. Bush informed her about her conversations with Mr. Stewart and Mr. Pendarvis. Tr. 573, 575.

36. In response to a request for a meeting by Ms. Polivy, on July 1, 1993, Polivy and Mr. Rey on behalf of Rainbow met in Roy Stewart's office at Commission headquarters, 1919 M Street, N.W., Washington, D.C., with Stewart; Barbara Kreisman, Chief of the VSD; Clay Pendarvis, Chief of the Television Branch; Gordon; and Robert Ratcliffe, Assistant Chief for Law of the Bureau. Jt. Ex. 1, Stipulation No. 26; Tr. 451-52. Neither Press nor any of its principals nor Harry Cole, Press's counsel, attended the July 1 meeting. Jt. Ex. 1, Stipulation No. 27. The discussion at the July 1, 1993 meeting addressed extensively the merits of RBC's applications for extension of time to construct. Jt. Ex. 1, Stipulation No. 28.

37. Ms. Polivy testified that, prior to the July 1, 1993 meeting, she had a brief (10-second) conversation with Mr. Pendarvis in setting up the meeting at which Mr. Pendarvis asked whether there had been any objections filed in the matter. Tr. 462, 466. Ms. Polivy testified that she told Mr. Pendarvis (Tr. 462):

Press had filed an informal objection. It was late. They filed a reconsideration to the informal objection, and then the[y] filed an informal objection to the sixth extension, and they filed informal objections to everything else that we filed.

Ms. Polivy further stated that she may have had a similarly brief conversation with Mr. Stewart in the process of setting up the July 1, 1993 meeting. Tr. 388-89.³ At no time did Ms. Polivy claim that she discussed the fact that the Office of Managing Director had stated that the proceeding was restricted in the Daniels letter. Tr. 503.

38. Neither Mr. Pendarvis nor Mr. Stewart recall any conversation at all with Ms. Polivy in which she mentioned to them the *ex parte* rules, or their possible application to the RBC applications prior to the July 1, 1993 meeting. Press Ex. 21, pp. 10-12; Press Ex. 19, pp. 11-12.⁴

39. At the meeting itself, Ms. Polivy and Mr. Rey did not make any reference to the *ex parte* rules or the potential applicability of the *ex parte* rules to the meeting. Press Ex. 19, pp. 13-16. They also did not mention the Daniels letter. Tr. 515.

40. Mr. Rey attended the July 1, 1996 meeting with the Bureau staff to provide

³ Although Ms. Polivy specifically included Press' Petition for Reconsideration in her summary of what she told Mr. Pendarvis and/or Mr. Stewart had been filed against RBC, she omitted the Petition for Reconsideration when she previously described that same conversation in her statement to the FCC Inspector General. See Separate Trial Staff Ex. 1 at p. 10 (mentioning only that Press had filed "an informal objection"). See also Tr. 490-98. Mr. Rey recalled that at the July 1, 1993 meeting with the FCC staff in Mr. Stewart's office, there was mention made of the fact that Press had filed "informal objections." Tr. 721-22.

⁴ The oral deposition of Mr. Stewart, Clay Pendarvis, Barbara Kreisman, and Robert Ratcliffe were admitted into the record by stipulation in lieu of their appearance at the hearing. Press Ex. 19, 20, 21.

information about what RBC had done during its construction period. Tr. 720-21. He had not contacted the FCC staff personally. Tr. 720-21.

41. Immediately after the meeting with the Bureau staff, Ms. Polivy and Mr. Rey returned to Ms. Polivy's office to work on a Petition for Reconsideration of the Kreisman decision. Tr. 396. The petition was filed the following day, July 2, 1996. Jt. Ex 1, Stipulation No. 29.

42. Mr. Stewart granted the petition for reconsideration on July 30, 1993, and granted RBC's sixth extension request and request for transfer to RBL. Jt. Ex. 10.

Issue 2: Financial Misrepresentation Issue

43. Issue 2 seeks "To determine whether [RBC] made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise."

44. The issue arose because the Court of Appeals found that "substantial and material questions of fact exist regarding [RBC's] representations contained in its January 1991 extension request about its financial qualifications" *Press*, 59 F.3d 1371. The Court noted particularly the discrepancy between RBC's representations to the Commission that it remained financially qualified when it filed its fifth extension request in January 1991, and the finding of the United States District Court for the Southern District of Florida in *Joseph Rey, et al. v. Guy Gannett Publishing Co., et al.* (No. 90-2554-CIV, United States District Court, S.D. Florida) ("Miami Tower Litigation") that RBC has not obtained any financing commitment for the project. *Id.*

45. On or about November 2, 1990, RBC brought an action for injunctive relief against Guy Gannet Publishing Company ("Gannett") the owners of the transmission tower RBC planned to use. Jt. Ex. 1, Stipulation No. 12; Press Ex. 9. The lawsuit was originally filed in Florida state court, but Gannett removed it to the United States District Court for the Southern District of Florida within a week of its filing. Jt. Ex. 1, p. 2; Tr. 731, 931. See Press Ex. 9; Tr. 777. The complaint in the Miami Tower Litigation sought a preliminary injunction to prevent Gannett from leasing space at the top of the tower for an antenna to Press.

46. The complaint alleged that if Press was able to move its antenna location to the top of the Bithlo tower, RBC would not be able to obtain any financing for its construction of a competing station, and its construction permit would be rendered "valueless." Press Ex. 9 at 9 ¶ 27. Joseph Rey personally signed and swore to the accuracy of the complaint. Press Ex. 9 at 11; Tr. 710, 774, 778.

47. The complaint specifically incorporated by reference the statement of Susan Harrison, a principal in a Washington, D.C. consulting firm specializing in financial and economic analyses for the communications industry. Press Ex. 9 at 9 ¶ 27. Ms. Harrison's affidavit averred, *inter alia*, that if Gannett leased the space to Press RBC will be irreparably injured because, according to Harrison, RBC's construction permit will be worthless and RBC "will not be able to secure the financing to build a television station for Channel 65 on the Bithlo tower or any other tower in the area." Press Ex. 9 at 13.

48. Ms. Harrison's affidavit explained her opinion as follows (Press Ex. 9 at 13):

There are currently four television stations (all which are currently affiliated with a network) operating from a centrally-

located transmitter site in the Orlando area. That market can only accommodate five television stations, i.e., one additional station. Any more stations would not be economically viable since they would not achieve minimum share levels required for buyers of television advertising time.

According to Ms. Harrison's affidavit, Press' entry on the same position on the Bithlo tower as currently leased to RBC "would create two television stations where only one additional station can economically survive on that site." *Id.* Before signing the complaint, Mr. Rey read Ms. Harrison's affidavit, and agreed with it. Tr. 936-37.

49. In furtherance of RBC's request for a preliminary injunction, Mr. Rey, on behalf of RBC, gave the following testimony on direct examination on January 11, 1991, regarding the impact that locating Press at the top of the Bithlo tower would have on RBC's ability to obtain financing. Press Ex. 10 at 6-9 (emphasis added):

Q: Now, you also do not have any written loan agreements with anybody to finance your venture --

A: Written, no.

Q: Who is your financier? Who is loaning you the money for this --

A: Rainbow has an agreement with an investor to build and operate the station. It has not been reduced to writing because of this.

* * *

Q: Who is it?

A: By the name of Howard Conant.

Q: Is he representing a group of [investors] or just himself?

A: I believe its just himself.

* * *

Q: Has he actually given you some money and taken a promissory note, for example?

A: I said it has not been reduced to writing because of this. There is an agreement for the financing of the station, and then this hit and everything was put on hold. You asked me that in a deposition. I said that *everything has been put on hold because of this.*

Q: Has this gentleman told you he will no longer loan you the money?

A: It's pending the resolution of this matter.

Q: Has he told you that if your space is not exclusive on [the Gannett tower] that he won't finance you?

A: *He has told me if Channel 18 gets on that tower, the likelihood is that he will not finance the station.*

Q: Have you talked to anybody else about loaning you the money?

A: As of late, he is the only person I was talking to.

50. Two weeks later, on January 25, 1991, while the preliminary injunction proceeding was still pending, RBC filed an application for a fifth extension of its construction permit. Jt. Ex. 2. In that extension request, RBC stated that "All representations in contained in the application for construction permit still are true and correct." Jt. Ex. 2, p. 1. Mr. Rey had previously certified in his original construction permit application that RBC was financially qualified, and he never sought to modify that certification. Tr. 937-38. The application was signed by Mr. Rey for RBC. Further, in a supplemental statement by Mr. Rey attached to the form extension request, Mr. Rey stated that "RBC is ready, willing, and able" to proceed with construction of the station. *Id.* at p. 3. Mr. Rey never told the Commission that if Press were able to place its antenna at the top of the Bithlo tower, it was likely that RBC would not be able to obtain financing from Mr. Conant or from anyone else. Tr. 929, 932-34.

51. Both Mr. Rey and Howard Conant testified at the hearing regarding the status of RBC's financing at the time it filed its fifth extension request. Mr. Conant submitted a written sworn statement (Rainbow Ex. 4), and gave supplemental oral testimony. Tr. 650.

52. According his sworn statement (Rainbow Ex. 4, p. 2):

Joe Rey came to my office in Chicago in late 1990 to discuss Rainbow's progress. *He told me at that time that the project had, in his opinion, become riskier because of a dispute over tower space and the possibility that there would be an additional television signal in the market.* He also questioned whether or not it would be advisable to seek a form of equity financing, rather than to rely upon financing through me, especially during a time of national economic downturn. *I was concerned about the problems that he raised and particularly about the prospect of another market television station. I recall telling Joe that I would take a wait and see attitude and that he should, as well.* I never stated to him that I would not honor my commitment to the company, and while there was some skepticism on our part, the meeting concluded without a change in our agreement to go forward. (Emphasis added.)

53. On oral examination, particularly examination by the Presiding Judge, Mr. Conant sought to qualify his written statement. Mr. Conant asserted in his oral testimony that he did not have any personal concerns about the viability of the project, did not think that adding another station to the market was "a major obstacle," and merely "reflected Mr. Rey's stated concerns. Tr. 686. Mr. Conant also revised his statement that he took a "wait and see attitude," stating in his oral testimony on examination by the Presiding Judge that he was merely going to wait until he was told by Mr. Rey that there was final authority to build the station. Tr. 687. However, when RBC's counsel stipulated that RBC had obtained final authority to construct its station on August 30, 1990 upon the denial of reconsideration by the Supreme Court (Tr. 688), Mr. Conant could point to no other reason why he could not